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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6437

JIMMY LEE SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PRELIMINARY STATEMENT

Respondent accepts the Citation to Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, and the Statement of the Case found on pages 1 through 3 of Petitioner's Petition for Writ of Certiorari.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner asserted that the trial court erred on two grounds: (1) That the court "commented on the evidence" in that on three separate occasions the trial court stated:

> The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time. You may proceed.
>
> * * *
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.
>
> * * *
>
> The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

(R 406, 419, 436).

(2) That the trial court failed to instruct the jury on the weight to be given a confession. Smith v. State, 407 So.2d 894, 896-897 (Fla. 1981).

The Florida Supreme Court in addressing the first issue concluded that the trial court committed no error in that the court was attempting to comply with this Court's decision in Sims v. Georgia, 385 U.S. 538 (1967), that the record reflects with unmistakable clarity that the trial court found the confession to be voluntary. As to the second claim, whether the trial court erred in failing to instruct

the jury on the weight to be given a confession, the court concluded since no contemporaneous objection was made at trial and said issue did not constitute fundamental error, Smith was precluded from arguing said claim on direct appeal.

REASONS FOR DENYING THE WRIT

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING SMITH'S CONVICTION AND DEATH SENTENCE IN WHICH IT APPROVED THE ACTION OF THE TRIAL COURT WHEN SAID COURT ADVISED THE JURY THAT HE HAD FOUND SMITH'S CONFESSION TO BE VOLUNTARY.

In McDole v. State, 283 So.2d 553 (Fla. 1973), the Florida Supreme Court held that pursuant to the requirement set forth in Sims v. Georgia, 385 U.S. 538 (1967), a trial court must make a finding with unmistakable clarity for the record that the confession was voluntarily made prior to the admission of said confession. In Smith v. State, 407 So.2d 894 (Fla. 1981), the Florida Supreme Court was faced with the question of whether the trial court had erred in that he had made his findings of voluntariness known to the jury prior to the admission of said confession. Smith argues that the actions of the Florida Supreme Court:

> [R]eached the polar opposite conclusion from virtually every other appellate court which has had occasion to discuss the issue. Until now, it has consistently been held, assumed, or stated by way of dicta, that the trial court's finding of voluntariness should not be disclosed to the jury. See United States v. Bear Killer, 534 F.2d 1253, 1258-59 (8th Cir. 1976);. . ."

(Petitioner's petition, p.5). Respondent would disagree and submit that the authorities cited by Petitioner are either distinguishable or conclude that the activity complained of does not constitute reversible error.

Petitioner relies heavily on the Eighth Circuit's opinion in United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976), wherein the Eighth Circuit found that although the trial court advised the jury therein of its finding of voluntariness, the error was harmless. A careful reading of the Bear Killer case, supra, reveals that said case specifically dealt with the statutory command of 18 U.S.C. 3501(a), to-wit: federal law. The decision of the Eighth Circuit in determining the correctness of the federal instruction was predicated on previous federal law in United States v. Adams, 484 F.2d 357 (7th Cir. 1973), as to whether a jury redetermines the constitutional admissibility of a confession. While at first blush, United States v. Bear Killer, supra, appears applicable, more careful analysis dispels any applicability to the instant case.

In dicta, the Eighth Circuit in Bear Killer, supra, observed that "irrespective of the statutory command, fairness requires that the court not disclose to the jury its finding of voluntariness." 534 F.2d at 1259.

The decision in United States v. Bear Killer, supra, is erroneous. Said decision fails to take into account the fact that where, as here, the trial court has made a finding of voluntariness, the jury is not required to redetermine whether said confession was voluntary, but rather the jury must determine the weight and truthfulness of said confession. See Lego v. Twomey, 404 U.S. 477, 486-489 (1972); Sims v. Georgia, supra; Jackson v. Denno, 378 U.S. 368 (1964); and Dempsey v. State, 355 A.2d 455, 460-461 (Md. 1976).

In the instant case Petitioner and the Eighth Circuit Court of Appeals in United States v. Bear Killer, supra, erroneously overlooked this Court's decision in Pinto v. Pierce, 389 U.S. 31 (1967), wherein this Court concluded

that where a voluntariness hearing was held in the presence of the jury, and said confession was held to be voluntary,

> This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. Jackson v Denno, [citation omitted], held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury. In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent. . . .

389 U.S. at 32. In United States ex rel. Russo v. State of New Jersey, 438 F.2d 1343 (3rd Cir. 1971), the court in a capital murder case:

> . . . The mandate of *Jackson* is that the judge presiding at the trial must determine for himself that the confession is admissible. Once the judge has so determined, even if the hearing is held in the presence of the jury, as occurred here, the requirement of *Jackson* is satisfied. Pinto v. Pierce, *supra;* United States ex rel. Bennett v. Rundle, *supra*, 419 F.2d at 606; *see* Sigler v. Parker, 396 U.S. 482, 90 S.Ct. 667, 24 L.Ed.2d 672 (1970); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); the Supreme Court, 1963 Term, 78 Harv.L.Rev. 143, 211-213 (1964).

438 F.2d at 1348.

If it is permissible for the jury to hear the evidence presented at the voluntariness hearing and the trial court subsequently concludes that said confession was voluntary based on said hearing, how can there be any constitutional infirmity where, as in the instant case, the court with unmistakable clarity provides statements on the record that said confession was admissible, and therefore, subject to further jury consideration? Pinto v. Pierce, supra.

Petitioner attempts to suggest that the Florida Supreme Court has laid down an iron-clad rule that a trial judge can announce his findings to the jury with regard to the voluntariness hearing. Petitioner misreads Smith v. State, supra. The Florida Supreme Court observed that "[t]he judge in the case *sub judice* was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper." 407 So.2d at 897. While the court found that said practice was not impermissible, the court did not extole the virtues of traveling this avenue in order that state trial judges complied with Sims v. Georgia, supra. To suggest that the Florida Supreme Court's decision is a carte blanche pronouncement is incorrect.

Petitioner's second complaint is that the trial court erred in not instructing the jury with regard to the weight to be given Smith's confessions. This issue was not preserved for appellate review, and the Florida Supreme Court so held in Smith v. State, supra, at 898. Pursuant to this Court's recent pronouncement in Engle v. Isaac, 31 Cr.L. 3001 (1982) and United States v. Frady, 31 Cr.L. 3013 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977), Petitioner is without redress as to this issue.

Finally, Petitioner asserts:

> Under the precedent set forth by the Florida Supreme Court in the present case, the trial court's announcement to the jury that he has found a confession voluntary will distort the jury's assessment of the reliability of the confession, and the weight to be accorded the confession.

(Petitioner's petition, p.12). Petitioner in arguing this issue to the state court did not assert this theory but rather that:

> A judge's determination on the admissibility of a confession does not finally determine its voluntariness. The credibility, weight, and value of the confession are still for the jury to determine, and the voluntariness of the confession is an important factor in that determination.

Petitioner was actually arguing to the state supreme court that the admissibility of the confession should have been redetermined by the jury. That is not the rule in Florida. Based on this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1968), and Conquest v. Mitchell, 618 F.2d 1053 (4th Cir. 1980), Petitioner has failed to previously raise the claims raised herein.

Respondent would submit that based on the foregoing, this Court should deny Petitioner's Petition for Writ of Certiorari in the instant cause in that Petitioner has failed to demonstrate grounds upon which relief may be granted. The Florida Supreme Court in affirming the judgment and sentence below, did so in accord with decisions rendered by this Court.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to STEVEN L. BOLOTIN, Assistant Public Defender, Second Judicial Circuit, Counsel for Petitioner, by hand this 23rd day of April, 1982.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

OF COUNSEL.